

STATUTORY INSTRUMENTS

2005 No. 24.

THE COMMUNICATIONS (FAIR COMPETITION) REGULATIONS, 2005.

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SCHEDULE—GUIDELINES FOR DETERMINING BREACH OF FAIR COMPETITION.

STATUTORY INSTRUMENTS

2005 No. 24.

The Communications (Fair Competition) Regulations, 2005.

(Under section 94 of the Uganda Communications Act, Cap 106)

IN EXERCISE of powers conferred on the Uganda Communications Commission by section 94 of the Uganda Communications Act, these Regulations are made this 7th day of January, 2005.

1. Title

These Regulations may be cited as the Communications (Fair Competition) Regulations, 2005.

2. Application of Regulations

(1) These Regulations apply to an operator issued with a licence under the Act and to any other person required to comply with Part X of the Act.

(2) In applying and implementing Part X of the Act and these Regulations, the Commission shall have power—

- (a) to monitor and enforce fair competition in the communications sector;
- (b) to investigate all acts in breach of fair competition;
- (c) to conduct proceedings, inquiries or public consultations in order to render or make a decision on acts or conduct in breach of fair competition;
- (d) to apply the Communications (Practice and Procedure) Regulations, 2005, where applicable, in fair competition proceedings; and
- (e) to impose sanctions, penalties or issue orders against operators and persons whose acts or conduct are anti-competitive or in breach of fair competition.

3. Objectives of Regulations

The objectives of these Regulations are—

- (a) to promote the efficiency and competitiveness of the communications industry in Uganda;
- (b) to ensure that communication services are reasonably accessible to all people in Uganda;
- (c) to ensure that communication services are supplied as efficiently and economically as is practicable and at performance standards that reasonably meet the social, industrial and commercial needs of Uganda;

- (d) to promote and maintain a fair and efficient market conduct and effective competition among all persons engaged in commercial activities connected with the communication sector in Uganda;
- (e) to encourage, facilitate and promote industry self-regulation in the communication industry in Uganda;
- (f) to encourage, facilitate and promote investment and establish, develop and expand the communication industry in Uganda; and
- (g) to design consumer protection mechanism and prevent anti-competitive conduct in the communications industry.

4. Interpretation

In these Regulations, unless the context otherwise requires—

“Act” means the Uganda Communications Act, Cap 106;

“commercial activities connected with telecommunications” means the provision of telecommunication services, the supply or export of telecommunication apparatus and the production or acquisition of telecommunication apparatus for supply or export;

“Commission” means the Uganda Communications Commission established under the Act;

“interconnection” means the physical and logical linking of telecommunications networks used by the same or a different operator in order to allow the users of one operator to communicate with users of the same operator or to access services provided by another operator;

“inter-operability” means the ability of two or more facilities or networks to be connected to exchange information, and to use the information that has been exchanged;

“licence” means a licence issued under the Act;

“major licence” with reference to radio communications and telecommunications includes a licence for the provision of local, long distance or international telephone services, trunk capacity resale, rural telecommunications, store and forwarding messaging and cellular or mobile services;

“non-discrimination” means the treatment by an operator of all interconnect operators and its own business on a basis of equivalence of economic quality of service and other relevant terms and conditions;

“number portability” means the ability of users of telecommunications services to retain at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications operator to another;

“operator” means any licensee providing communications services under the Act;

“practice and procedure regulations” means the Communication (Practice and Procedure) Regulations, 2005, made under the Act;

“service provider” means a service provider that offers services to end users, either by using the basic service and infrastructure provided by network operators on a re-sale basis, or by providing services through their own infrastructure where they form part of a network operation;

“telecommunication” means the emission, transmission or reception through the agency of electricity or electromagnetism of any sounds, signals, signs, writing, images or intelligence of any nature by wire, radio, optical or other electromagnetic systems whether or not the sounds, signals, signs, writing, images or intelligence are subjected to rearrangement, computation or other processes by any means in the course of their transmission, emission or reception;

“telecommunications services” means services consisting of the conveyance or reception of any sound, sign, signal, writing, intelligence or image, by wire, optical or other electronically guided media system whether or not the sound, sign, signal, writing, intelligence or image is subjected to rearrangement, computation or other process by any means in the course of its transmission, emission or reception;

“user” means an individual, including a consumer or an operator using or requesting publicly available communications services.

5. Rules of fair competition

(1) The rules of fair competition shall to the extent practicable, be based on the principles of competition law and practice relating to the prohibition of—

- (a) anti-competitive agreements, decisions or concerted practices;
- (b) abuse of a dominant position;
- (c) anti-competitive mergers, take-overs, consolidations, acquisitions or such anti-competitive changes in the market structure resulting from changes in ownership, control, composition and structure of operators; and
- (d) all other practices and acts with an effect on fair competition including unfair methods of competition, unfair or deceptive acts or practices, the purpose or effect of which is to distort competition in the communications market.

(2) An operator licensed under the Act shall not engage in any activity, whether by act or omission, which has or is intended to or is likely to have the effect of unfairly preventing, restricting or distorting competition where the act or omission is done in the course of or as a result of or in connection with any business activity relating to communication services.

(3) For the avoidance of doubt, an operator shall be taken to have engaged or to be engaged in an anti-competitive act, if by commission or omission that act has an appreciable effect on fair competition in the communications market.

6. Acts of unfair competition

(1) An act or omission of an operator with a dominant position whether independently or with others shall constitute or amount to an abuse by the operator, of its dominant position where the act or omission involves—

- (a) price abuses or anti-competitive pricing through predatory price-cutting, price squeezes, cross-subsidisations, price-discrimination or any form of direct or indirect imposition of unfair purchasing or selling prices or other unfair trading conditions;
- (b) any conduct which exploits customers or suppliers through excessively high prices or discriminatory prices or terms, conditions or conduct which removes or limits competition from existing competitors or which excludes new undertakings from entering the market through predatory behaviour, vertical restraints or refusal to supply existing or potential competitors;
- (c) limiting production, markets or technical development to the prejudice of consumers;
- (d) applying dissimilar conditions to equivalent transactions with other parties, which place them at a competitive disadvantage;
- (e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts;
- (f) predatory network alterations, where the dominant operator alters the physical or logical interface of its network in a manner that imposes significant costs on interconnected operators without any legitimate business, operational or technical justification;
- (g) refusal to supply or grant access to facilities;
- (h) refusal to interconnect or act in good faith during interconnection negotiations; or
- (i) engaging in unfair methods of competition that improperly deter or are likely to deter new entrants in the communications market or restrict or are likely to restrict existing competition in the communications market for reasons unrelated to the availability, price or quality of the service that a prospective or current operator offers or seeks to offer through—
 - (i) false or misleading claims;
 - (ii) degradation of service availability or quality;
 - (iii) provision of false or misleading information to competitors; or
 - (iv) interference with end-user or supplier relationship.

(2) For the avoidance of doubt and without limiting the general effect of this subregulation, the following conditions shall constitute vertical restraints imposed by a dominant operator, that potentially reduce competition—

- (a) resale price maintenance;
- (b) selective distribution;

- (c) exclusive distribution;
- (d) exclusive purchasing or dealing;
- (e) tie-in sales and bundling;
- (f) full-line forcing;
- (g) quantity forcing;
- (h) fidelity discounts; and
- (i) non-linear pricing.

(3) An agreement between an operator or a decision by an association of operators or a concerted practice restricting or distorting competition in the communications sector, shall constitute an act of unfair competition.

(4) The act of unfair competition in subregulation (3) shall include—

- (a) directly or indirectly fixing purchase prices or selling prices;
- (b) agreements to fix trading conditions;
- (c) agreements to share markets;
- (d) agreements to limit or control production or investment;
- (e) collusion tendering or bid-rigging;
- (f) group boycotts;
- (g) agreements with a potential to result in higher prices or reductions in output of communications services or equipment;
- (h) agreements between operators and entities at different levels in the supply chain as a down-stream reseller or an upstream provider of communications services, such as vertical price fixing, vertical market allocation or exclusive dealing;
- (i) bundling including “tie-in” sales, or “locking-in” customers;
- (j) joint buying or selling agreements between buyers to fix the price at which they are prepared to buy or sell and similar agreements between sellers where they agree to boycott certain customers;
- (k) information sharing agreements where the exchange has an appreciable effect on competition;
- (l) exchange of price information that eliminates competition between the co-operating operators;
- (m) exchange of non-price information that has an effect on competition;
- (n) advertising restrictions relating to among others, the amount, nature or form;
- (o) standardisation agreements that contain restrictions on what the parties may produce and which as a result limit competition from other sources through raising entry barriers; and
- (p) all anti-competitive agreements with an appreciable effect on competition like aggregated rebate schemes, specialisation agreements, co-

operation in research and development or joint ventures for the development of new products or markets.

(5) A transaction by an operator relating to its ownership, shareholding, constitution, composition, management, control or change shall be deemed to be anti-competitive with an appreciable effect on fair competition in the communications market, to the extent it affects the market structure.

(6) An operator who seeks to undergo a restructuring, consolidation, amalgamation, re-arrangement or re-composition of its structure, composition, management, control, ownership or shareholding by way of a merger, joint venture, acquisition, take-over or consolidation shall obtain the approval of the Commission before undergoing the desired scheme or arrangement.

7. Discrimination and undue preference

(1) An act or omission of an operator shall amount to an act of discrimination or undue preference where the operator—

- (a) directly or indirectly, by any means or device, makes unjust or unreasonable discrimination in the charges, practices, classification, regulations, facilities or services for or in connection with similar or like communications service;
- (b) makes or gives undue or unreasonable preference or advantage to a particular person, class of persons or locality, or subjects any person, class of persons or locality to undue or unreasonable prejudice or disadvantage;
- (c) unfairly favours a business carried on by an operator so as to place at a significantly competitive disadvantage, other operators lawfully competing with that business;
- (d) unjustly or unfairly denies access or service to a customer; or
- (e) refuses or fails to provide, or in any way denies customers or operators equal opportunity for access to the same type and quality of service.

(2) A licensee shall offer non-discriminatory treatment to the public in the provision of communication services.

(3) A licensee shall—

- (a) not discriminate against or grant any preference to any person utilising communication services; and
- (b) offer rates, terms, conditions and technical standards for its services or through its affiliates, identical and equivalent to those offered to other unaffiliated operators.

8. Exemptions

(1) An operator may apply to the Commission for an exemption order, for the exemption of an agreement or a conduct of the operator falling within the acts of unfair competition in these Regulations.

(2) An application for an exemption order shall be in writing, in a form approved by the Commission and shall be accompanied by the prescribed fee.

(3) The Commission shall upon receiving an application for an exemption order, publicise the receipt of the application in such manner as the Commission considers fit.

(4) Where the Commission receives an application for an exemption order, it may invite public comments to discuss the application or hold a public inquiry on the matter.

(5) Where the Commission decides to invite public comments or to hold a public inquiry, it shall give the applicant and any other person whom the Commission considers interested, a reasonable opportunity to attend and take part in the public inquiry.

(6) The Commission may grant an exemption order in relation to particular conduct of an operator where the Commission is satisfied that—

- (a) the conduct will result, or is likely to result in a benefit to the public;
- (b) the resultant public benefit outweighs, or will outweigh the detriment to the public constituted by any lessening of competition that will result, or is likely to result from engaging in the conduct; or
- (c) the conduct is not anti-competitive or a breach of the fair competition rule.

(7) In determining whether to grant an exemption order under subregulation (6), the Commission may have regard to—

- (a) the extent to which the conduct relates to the supply of goods or services on favourable terms and conditions to—
 - (i) a financially disadvantaged individual;
 - (ii) an individual who is disadvantaged on health grounds;
 - (iii) a non-profit community organisation or a non-profit charitable organisation;
 - (iv) an educational institution; or
 - (v) a health facility;
- (b) the extent to which the conduct relates to the supply of goods or services for—
 - (i) community, charitable or educational purposes; or
 - (ii) the promotion of health or safety, on favourable terms and conditions;
- (c) the need to satisfy any applicable universal service obligation;
- (d) the extent to which the conduct prevents or reduces, or is likely to prevent or reduce pollution or other forms of degradation of environmental amenities; and

(e) the extent to which the conduct contributes, or is likely to contribute to technical innovation, or the development of new goods or services.

(8) Where the Commission makes an exemption order, it shall give the applicant a written notice setting out the order and the reasons for the order.

(9) Where the Commission refuses to make an exemption order, it shall give the applicant a written notice stating that the order is refused and the reasons for the refusal.

(10) An exemption order shall be subject to such conditions as the Commission may specify in the order.

(11) The Commission shall, if satisfied that—

(a) the order was made on the basis of information that was false or misleading in a material particular;

(b) a condition to which the order is subject is contravened; or

(c) there has been a material change of circumstances since the order was made,

revoke the order.

(12) The Commission shall not revoke an exemption order unless the Commission—

(a) publishes a draft notice of revocation and invites the public to make submissions on the draft notice; and

(b) considers any submissions received, within the time limit specified in the draft notice.

(13) Where the Commission revokes an exemption order relating to a person, the Commission shall give that person a written notice stating that the order is revoked and setting out the reasons for the revocation.

(14) The Commission shall keep a register of the exemption orders issued.

(15) The register under subregulation (14) shall include—

(a) particulars of all exemption orders;

(b) applications for exemption orders received by the Commission;

(c) particulars of decisions for refusal to make exemption orders;

(d) particulars of decisions revoking, or refusing to revoke, exemption orders;
and

(e) particulars of the Commission's reasons for making exemption orders.

(16) The register shall not set out any information whose disclosure would reasonably be expected to prejudice substantially the commercial interests of the operator, or of any of the persons, to whom the information relates.

(17) Any person may, on payment of the fee prescribed by the Commission—

(a) inspect the register; and

(b) make a copy of or take an extract from the register.

(18) An operator applying for an exemption order shall not in connection with the application, intentionally or recklessly—

(a) give information to the Commission, that is false or misleading in a material particular; or

(b) omit from information given to the Commission, any matter or thing without which the information given would become misleading in a material particular.

(19) For the avoidance of doubt—

(a) an act or omission of a kind described as abusive conduct is not prohibited where—

(i) it has or would have no appreciable effect on competition;

(ii) it has or would have no effect on competition between persons engaged in commercial activities connected with the communications sector; or

(iii) it would have no effect on users of communication services;

(b) an act or omission of a kind described as an anti-competition agreement, decision or concerted practice is not prohibited where the anti-competition agreement, decision or concerted practice contributes to improving the provision of any goods or services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and where the anti-competition agreement, decision or concerted practice does not—

(i) impose on the parties concerned, restrictions which are not indispensable to obtaining the objectives stated in this regulation; and

(ii) afford the parties the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

9. Types of exemptions

(1) There shall be the following exemptions—

(a) individual exemptions; and

(b) block exemptions.

(2) An individual exemption shall be applied for by an operator and upon satisfying the exemption criteria, the Commission shall grant an individual exemption order.

(3) An individual exemption shall be granted subject to such conditions or obligations and for such a period as the Commission may determine.

(4) The Commission may make a block exemption which exempts a particular category of agreements, which it considers likely to satisfy the statutory exemption criteria.

(5) A block exemption shall impose the following conditions or obligations—

(a) authority to the Commission to cancel the block exemption in respect of an agreement where there is a breach of a condition imposed by the block exemption;

(b) authority to the Commission to cancel the block exemption in respect of an agreement where there is failure to comply with an obligation imposed by the block exemption; or

(c) authority to the Commission to cancel the block exemption in respect of an agreement where the Commission considers that an agreement does not satisfy the statutory exemption criteria.

10. Notifications

(1) An operator may make a notification to the Commission for guidance on whether the operator's agreement and conduct comply with the provisions of fair competition under the Act or the rules of fair competition under these Regulations.

(2) It shall be the responsibility of an operator to ensure that the operator's agreement and conduct comply with the Act and these Regulations.

(3) The guidance by the Commission sought by an operator in subregulation (1) shall indicate—

(a) whether the agreement or conduct is likely to infringe any relevant provisions of fair competition under the Act or these Regulations; or

(b) whether the conduct or agreement would be likely to be granted an exemption if an application in that regard, was made.

(4) Where guidance is given, the Commission shall not re-open a case unless—

(a) there are reasonable grounds for believing that there has been a material change of circumstances since the guidance was given;

(b) there is a reasonable suspicion that materially incomplete, misleading or false information was given; or

(c) a complaint is received from a third party.

11. Enforcement procedures

(1) The Commission shall in the enforcement of the rules of fair competition apply the practice and procedure regulations in regard to complaints, investigations, proceedings, hearings and decision-making.

(2) In addition to the practice and procedure regulations, enforcement of the rules of fair competition shall be subject to the following specific regulatory principles, practices and procedures—

(a) the Commission may begin an investigation into a complaint—

- (i) following a complaint by any person;
- (ii) as a result of an issue arising from an investigation of any person as part of the Commission's performance of its duties; or
- (iii) where the Commission obtains information by other means, which suggests that a contravention of the rules of fair competition may have occurred or is occurring;

(b) upon a complaint about a particular conduct, the Commission shall determine whether there is reason to suspect that there is a contravention of the rules of fair competition under the Act or these Regulations, and if so, shall proceed to investigate the complaint;

(c) in determining whether to proceed with the investigation of a complaint, the Commission shall give priority to matters where—

- (i) there appears to be a blatant disregard for the law;
- (ii) the matter particularly affects disadvantaged consumers;
- (iii) there appears to be substantial damage to competition;
- (iv) there is significant public detriment;
- (v) successful enforcement by litigation or other means would have a significant deterrent or educational effect; or
- (vi) an important new issue is involved, for example arising from economic or technological change;

(d) where the Commission determines and finds that there is reason to suspect that there is a contravention of the rules of fair competition under the Act or these Regulations, the Commission shall issue a competition notice;

(e) the Commission shall make the decision to issue a competition notice after giving proper consideration to the merits of a case and deciding whether it has reason to believe that the operator concerned contravened the rules of fair competition under the Act and these Regulations;

(f) the competition notice shall state—

- (i) that the Commission is investigating a possible breach of fair competition;
- (ii) the reasons for the suspicion of a contravention or breach of fair competition, including any matters of fact or law which are relevant to the investigation;

- (iii) further information required from the operator in order to complete the investigations; and
- (iv) where appropriate, the steps to be taken in order to remedy the breach;
- (g) upon the Commission issuing a competition notice to an operator, the matters shall proceed in accordance with the practice and procedure regulations, to determine the matter and give a decision for it;
- (h) before making a decision on matters concerning fair competition, the Commission—
 - (i) shall provide an opportunity for public comment in connection with the material issues, through public consultation;
 - (ii) shall give full consideration to the public comments received;
 - (iii) shall not be bound by technicalities, legal forms or rules of evidence;
 - (iv) shall act as speedily as a proper consideration of the matter allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits and fair settlement of the dispute; and
 - (v) may inform itself of any matter relevant to the dispute in any way it thinks appropriate;
- (i) the Commission's decision and directions shall be non-discriminatory and the Commission shall treat similarly situated persons in the same manner and on an equal basis;
- (j) at any time during an enforcement proceeding, the Commission may issue an interim order directing an operator to cease and desist from a specified conduct, where the Commission is satisfied that—
 - (i) there is prima facie evidence that the operator contravened the Act or these Regulations, regarding fair competition;
 - (ii) continuation of the operator's conduct is likely to cause serious harm to other operators, consumers or the general public;
 - (iii) the potential anti-competitive harm in allowing the operator to continue its conduct outweighs the burden on the operator; or
 - (iv) issuance of the order is in the public interest;
- (k) where the Commission determines and decides that an operator has contravened fair competition under the Act or these Regulations, the Commission shall take the following enforcement actions—
 - (i) direct the operator to cease engaging in the conduct by issuing a cease and desist order;
 - (ii) direct the operator to take specific remedial action; or

- (iii) impose financial penalties on the operator not exceeding 10% of the operator's annual turnover;
- (l) in imposing financial penalties, the Commission shall consider any aggravating factors including—
 - (i) the severity of the contravention;
 - (ii) the duration of the contravention;
 - (iii) whether the contravention resulted in injury to person or property;
 - (iv) whether the operator acted knowingly, recklessly, or in a negligent manner;
 - (v) whether the operator has a previous history of contravention; or
 - (vi) whether the operator made any effort to conceal the contravention;
- (m) the Commission in imposing financial penalties shall consider any mitigating factors including—
 - (i) whether the contravention is minor;
 - (ii) whether the consequences from the violation are minor;
 - (iii) whether the operator took prompt action to correct the contravention;
 - (iv) whether the contravention was accidental; or
 - (v) whether the operator voluntarily disclosed the contravention to the Commission;
- (n) where the Commission is satisfied that an operator is likely to contravene fair competition under the Act or these Regulations again, the Commission may suspend or cancel or revoke the operators licence, using the procedures in the practice and procedure regulations; and
- (o) the Commission shall in all cases of enforcement, impose sanctions that give a significant deterrent to impermissible conduct, and which shall be proportionate to the severity of the contravention.

12. Guidelines for determining breach of fair competition

The Commission shall apply and use the guidelines specified in the Schedule to these Regulations in determining whether this is or has been a contravention of fair competition under the Act or these Regulations.

GUIDELINES FOR DETERMINING BREACH OF FAIR COMPETITION

1. (1) An agreement prohibited under the Act or these Regulations shall be established
 - (a) through direct evidence of the agreement, for example a signed document; or
 - (b) using circumstantial evidence that demonstrates the existence of the agreement;(2) An agreement may be tacit in absence of an actual agreement, for example where operators coordinate their production and pricing decisions in order to reduce aggregate output and raise market prices.
2. In order to determine whether a particular agreement or form of conduct is in contravention of fair competition under the Act or these Regulations, the Commission shall—
 - (a) seek to define the market to which the agreement or conduct in question relates;
 - (b) consider whether the operator in question has market power; and
 - (c) determine whether there is a breach of the rules of fair competition under the Act or these Regulations.
3. (1) The relevant market has two dimensions and is defined by reference to—
 - (a) the product that is sold in the market or the relevant good or service called “the product market”; and
 - (b) the geographical area within which the product is sold, called “the geographical market”.(2) A product market consists of the product or group of products to which the agreement or conduct relates, and includes any demand-side substitutes or supply-side substitutes whose availability prevent an operator from sustaining a small but significant increase in the price of a product above the competitive level.
 - (3) The boundaries of the geographical market shall depend on the extent to which—
 - (a) customers are able to switch to substitutes supplied by operators in different areas; and
 - (b) operators in different areas are able to supply substitute products.
 - (4) In determining whether an operator has market power, the Commission shall take into account a range of factors including—
 - (a) the operator’s market share and changes in that share over time; and
 - (b) whether there are constraints that prevent the operator from acting anti-competitively, even where the operator has a high market share.
 - (5) An operator in a dominant position is the operator who has a position of economic strength enjoyed by an undertaking which enables the operator to prevent effective competition from being maintained on the relevant market, by affording the operator the power to behave, to an appreciable extent, independently of competitors, customers and consumers.
 - (6) A dominant operator possesses a substantial degree of market power that is in excess of the market power held by any of its competitors.

(7) An operator may have market power or the greatest degree of market power in a particular market, without necessarily being the dominant operator.

(8) Two or more operators may jointly have collective dominance where they are linked in such a way that they adopt the same conduct in the market, which makes them dominant against other operators on the market.

(9) Where an operator's market share persistently exceeds thirty five per cent, it shall unless there is evidence to the contrary, be presumed and taken to be dominant.

(10) In assessing dominance, the Commission shall consider whether and the extent to which an operator faces the following constraints on its ability to behave independently—

- (a) existing competitors strength in the market per their market shares;
- (b) potential competitors shown by lack of significant entry barriers and the existence of other operators that can easily enter the market; and
- (c) other constraints such as strong buyer-power from the operator's customers including distributors, processors and commercial users.

4. Abusive conduct is—

(a) conduct which affects the competitive process by adversely affecting a consumer, directly through the price charged or indirectly through raising and enhancing entry barriers or increasing competitors costs; and

(b) anti-competitive conduct that—

(i) exploits a customer or supplier through excessively high prices or discriminatory prices or other terms and conditions through removing or limiting competition from existing competitors; or

(ii) excludes new operators from entering a market.

ABEL KATAHOIRE,
Chairperson, Uganda Communications Commission.